

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



# TRANSCRIPT OF RECORD.

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## Court of Appeals, District of Columbia

APRIL TERM, 1910.

No. 2146.

726

LE ROY MARK, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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FILED APRIL 9, 1910.

Oct. 17,

*[Signature]*

# COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1910.

No. 2146.

LE ROY MARK, APPELLANT,

*vs.*

THE DISTRICT OF COLUMBIA, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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# In the Court of Appeals of the District of Columbia.

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No. 2146.

LE ROY MARK, Appellant,  
vs.  
THE DISTRICT OF COLUMBIA.

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*a* Supreme Court of the District of Columbia.

At Law. No. 52081.

LE ROY MARK, Petitioner,  
vs.  
THE DISTRICT OF COLUMBIA, Respondent.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1. *Petition for Writ of Certiorari.*

Filed Nov. 5, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 52081.

LE ROY MARK, Petitioner,  
vs.  
THE DISTRICT OF COLUMBIA, Respondent.

The petitioner respectfully shows to the Court as follows:

1. That he is a citizen of the United States and a resident of the District of Columbia, and files this petition in his own right and in behalf of all others in like situation with respect to the matters hereinafter set forth.

2. The District of Columbia is a Municipal Corporation created by the Congress of the United States for Municipal purposes.

3. That on the 1st day of July, 1902, a Statute was passed by the Congress of the United States, entitled "An Act making appropriations to provide for the expenses of the Government of the District of Columbia for the Fiscal year ending June 30, 1903, and for other purposes"; by the sixth section of which an annual tax of one and one-half per cent ad valorem is imposed on all personal property of all persons in the District of Columbia, and said Statute is still in full force and effect.

2        4. That on March 3, 1909, Congress passed an Act entitled "An Act making appropriations to provide for the expenses of the Government of the District of Columbia for the fiscal year ending June 30, 1910 and for other purposes"; which said Statute contains the following clause: "Automobile Board, for Secretary or Acting Secretary of the Automobile Board \$300.00, provided, that hereafter there shall be assessed and collected an annual wheel tax on all automobiles or other motor vehicles owned and operated in the District of Columbia having seats for only two persons, the sum of \$3.00 and on all such vehicles having seats for more than two persons an additional tax of \$2.00 for each additional seat.

5. That petitioner is one of a large number of persons owning automobiles in the District of Columbia, upon which he and they have regularly paid the personal tax of one and one-half per cent. ad valorem imposed under the Act of 1902 aforesaid, as the same became due and payable.

6. That the assessor of the District of Columbia, assuming to act in the exercises of the power conferred by the act of March 3, 1909, aforesaid, has levied and assessed against your petitioner a tax of \$5.00 on a certain automobile owned and operated by your petitioner in the District of Columbia, and has demanded the payment thereof and said levy and assessment is now borne on the tax records of the District of Columbia as a charge against and liability on your petitioner.

3        7. That your petitioner is advised that said Act of Congress of March 3, 1909, is repugnant to the Constitution of the United States and void, in that it subjects this petitioner and the automobile owned by him, twice to the same burden of taxation, whilst other subjects of taxation belonging to the same class are required to contribute but once; that said tax is not uniform in the territory in which the law imposing it intended it to operate; that said law unjustly discriminates between the owners of personal property having automobiles, and owners of personal property not having automobiles; that said act denies to this petitioner the equal protection of the laws.

Wherefore, Petitioner Prays,

1. That a writ of Certiorari issue from this Court directing the District of Columbia to certify immediately to this court the records in its custody relating to the aforesaid levy and assessment.

2. That upon the returns thereof said levy and assessment be quashed and annulled by the judgment of this Court and this respondent be directed to make entry of the same on its records.

3. And for such other and further relief as the nature of the case may require.

PENNEBAKER, CARUSI & JONES,  
*Att'ys for Petitioner.*

DISTRICT OF COLUMBIA, ss:

4 Le Roy Mark, being first duly sworn, on oath deposes and says that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts therein stated of his personal knowledge are true and those stated upon information and belief he believes to be true.

LE ROY MARK.

Subscribed and sworn to before me the undersigned Notary Public this 5th day of November, 1909.

[SEAL.]

WILLIAM H. BADEN,  
*Notary Public, D. C.*

*Rule to Show Cause.*

Filed Nov. 5, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 52081.

LE ROY MARK, Petitioner,  
vs.

DISTRICT OF COLUMBIA, Respondent.

Upon consideration of the petition for a writ of certiorari filed herein, it is by the Court this 5th day of November, 1909,

5 Ordered: That the respondent, the District of Columbia show cause on or before the 12th day of November, 1909, why the writ should not issue as prayed, provided a copy of said petition and of this Order be served upon the respondent at least two clear days before the date aforesaid.

WRIGHT.

*Answer.*

Filed Nov. 19, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 52081.

LE ROY MARK, Petitioner,  
vs.

THE DISTRICT OF COLUMBIA.

The Answer of the District of Columbia to the petition filed herein and the rule issued thereon respectfully shows to the Court as follows:

1. It admits the allegations of the first paragraph of said petition as to the citizenship and residence of said petitioner, but it says that said petitioner has no standing in this court, in a proceeding of this character, to file the petition on behalf of others, not made parties to the record.

2. It admits the allegations of the second paragraph of said petition.

3 and 4. It admits the passage by Congress of the Act mentioned in paragraphs three and four, but for certainty of the provisions thereof respondent refers to the Acts themselves.

6 5. Respondent admits the allegations of paragraph four of said petition.

6. Respondent admits the allegations of paragraph six of said petition.

7. Respondent denies the allegations of paragraph seven of said petition that the said Act of Congress of March 3, 1909, is repugnant to the Constitution of the United States and void, or that it subjects said petitioner and the said automobile owned by him twice to the same burden of taxation, whilst other subjects of taxation belonging to the same class are required to contribute but one, or that said tax is not uniform in the territory in which the law imposing it intended it to operate, or that said law unjustly discriminates between the owners of personal property having automobiles, and owners of personal property not having automobiles, or that said Act denies to said petitioner the equal protection of the laws; on the contrary, respondent says that the tax imposed upon personal property under the said Act of Congress approved July 1, 1902, is an ad valorem tax, while that imposed under the Act of Congress of March 3, 1909, is a privilege tax, designed to increase the revenues of the District government.

Respondent files herewith as part hereof affidavit of officials of the District government showing the effect of automobiles on the streets and roads of the District and the great increase in cost to maintain the same since the advent of automobiles, and respondent says that such increase in cost of maintenance of said highways was among the considerations that induced Congress to impose said tax. And, also Section 10 of Article XXIV of the Police Regulations, prayed to — read as part hereof. And having fully answered said rule, respondent prays that said writ may be denied and said petition be dismissed.

THE DISTRICT OF COLUMBIA,  
By HENRY B. F. MACFARLAND,  
W. KELLY, *Acting,*

*Its Commissioners.*

E. H. THOMAS,  
*Att'y for D. C.*

— — —, being first duly sworn on oath says that he is one of the Commissioners of the District of Columbia, whose foregoing answer he has read; that the facts therein stated are true to the best of his official information and belief.

HENRY B. F. MACFARLAND.

Subscribed and sworn to before me this eighteenth day of November, A. D. 1909.

[SEAL.]

WILLIAM TINDALL,  
*Notary Public, D. C.*

*Copy of Provisions of Police Regulations.*

Section 10 of Article XXIV of the Police Regulations of the District of Columbia provides:

“The Board of Examiners of Steam Engineers, an Inspector of the Electrical Department and the Permit Clerk are hereby  
8 appointed ‘the Automobile Board,’ and as such will consider applications from persons who desire to operate motor vehicles of any kind, except railroad locomotives and electric railroad cars, in the District of Columbia, and that said Board shall after due examination make report to the Commissioners of the District of Columbia as to the competency or incompetency of each such applicant.

“That the permit clerk, District of Columbia, is hereby designated as the official to issue the permits when such applications have received the approval of the Automobile Board and the Commissioners.”

DISTRICT OF COLUMBIA, ss:

Lee R. Grabill, being first duly sworn, on oath says that he is Superintendent of County Roads of the District of Columbia, and has been for nearly 3 years and that he is a civil engineer by profession and has been for 20 years; that he has observed the action and effect of automobiles on the macadamized roads of the District and says:

That the destructive effect of automobiles upon these roads, due to their speed, the character of the tires, and the abrasive effect of the driving wheels, causing the loosening and scattering of the surface material of the roads, does very considerably increase the difficulty and the cost of maintaining such roads in suitable condition for travel.

LEE R. GRABILL.

9 Subscribed and sworn to before me this 18th day of November, 1909.

[SEAL.]

WILLIAM TINDALL,  
*Notary Public.*

CC.

(Endorsed:) There is nothing upon the record upon — this case can be submitted to the Court. Return to files. W.

*Demurrer.*

Filed Dec. 20, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 52081.

LEROY MARK, Plaintiff,

vs.

THE DISTRICT OF COLUMBIA, Defendant.

Comes now the petitioner by his attorneys, Pennebaker, Carusi & Jones and demurs to the answer of the District of Columbia to the rule to show cause, filed herein, and says that said answer is bad in substance.

PENNEBAKER, CARUSI & JONES,  
*Attorneys for Petitioner.*

10

*Memorandum.*

Among the matters of law to be argued upon the hearing of the above demurrer is that the automobile tax known as the wheel tax, referred to in the petition filed herein, is unconstitutional and void.

PENNEBAKER, CARUSI & JONES,  
*Attorneys for Petitioner.*

E. H. Thomas, Esq., Corporation Counsel:

Please take notice, that we shall argue the above demurrer on Friday, December 24, 1909, or as soon thereafter as we may be heard.

PENNEBAKER, CARUSI & JONES,  
*Attorneys for Petitioner.*

Supreme Court of the District of Columbia.

FRIDAY, January 14, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

\* \* \* \* \*

At Law. No. 52081.

11

LE ROY MARK, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

Upon consideration of the petitioner's demurrer to the answer of the respondent, filed herein, it is ordered that said demurrer be, and it is hereby overruled.

In the Supreme Court of the District of Columbia.

FRIDAY, *February 4, 1910.*

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

\* \* \* \* \*

At Law. No. 52081.

LE ROY MARK, Petitioner,  
vs.

THE DISTRICT OF COLUMBIA, Respondent.

It appearing to the Court that the petitioner's demurrer to the answer of the respondent herein was overruled on the 14th day of January 1910, and the petitioner now in open Court says that he will stand upon his demurrer, it is ordered that judgment on said demurrer be entered.

Therefore, it is considered that the rule to show cause herein, be, and the same is hereby discharged, the petition dismissed,  
12 and that the respondent recover against the petitioner, the costs of its defense, to be taxed by the Clerk, and have execution thereof.

From the foregoing the petitioner by his Attorney in open Court notes an appeal to the Court of Appeals of the District of Columbia, and, upon motion, the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars (\$100) or in lieu thereof a deposit of Fifty dollars (\$50).

*Memorandum.*

February 21, 1910.—Appeal bond approved and filed.

*Directions to Clerk for Preparation of Transcript of Record.*

Filed Feb. 28, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52081.

LE ROY MARK  
vs.  
DISTRICT OF COLUMBIA.

The Clerk of said Court will please make transcript of record for Court of Appeals, and include therein the petition, rule to show cause, answer, demurrer, order overruling demurrer and judgment, memo. of appeal bond.

EUGENE A. JONES,  
*Attorney for Petitioner.*

13 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 12, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, a copy of which is made part of this transcript, in cause No. 52081 at Law, wherein Le Roy Mark is Petitioner and The District of Columbia is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 4th day of April, 1910.

[Seal Supreme Court of the District of Columbia]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia, Supreme Court. No. 2146. Le Roy Mark, appellant, vs. The District of Columbia. Court of Appeals, District of Columbia. Filed Apr. 9, 1910. Henry W. Hodges, clerk.



COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

OCT.-5--1910

*Henry W. Hodges.*  
*Chanc.*

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# Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

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No. 2146.

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LE ROY MARK, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA, APPELLEE.

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BRIEF FOR APPELLANT.

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EUGENE A. JONES.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.



# Court of Appeals, District of Columbia.

**OCTOBER TERM, 1910.**

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**No. 2146.**

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LE ROY MARK, APPELLANT,

*vs.*

THE DISTRICT OF COLUMBIA, APPELLEE.

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**BRIEF FOR APPELLANT.**

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## **Statement of Case.**

This is an appeal from a judgment dismissing the appellant's petition for a writ of certiorari to quash a tax assessed against the petitioner by virtue of an act of Congress, approved March 3, 1909, entitled "An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 10, 1910," by one clause, of which an annual tax is imposed on automobiles in addition to the *ad valorem* tax imposed on all other personal property, and in addition to the license fees imposed by section one of article twenty-six of the police regulations. The statute was assailed as unconstitutional,

and this proceeding was brought to test its validity. The petition is brief and states the facts in full. See Record, pages 1 and 2.

### **Assignment of Error.**

The court below erred in holding the act constitutional and dismissing the petition.

### **ARGUMENT.**

#### **The Act Denies the Petitioner the Equal Protection of the Laws.**

The organic act providing a permanent form of government for the District of Columbia, approved June 11, 1878, vol. 20, Statutes at Large, 102, contains the following proviso: "Provided, that the rate of taxation in any one year shall not exceed one dollar and fifty cents on every one hundred dollars, of real estate not exempted by law; and on personal property not taxable elsewhere, one dollar and fifty cents on every one hundred dollars, according to the cash valuation thereof."

By an act approved July 1, 1902, entitled "An act making appropriations to provide for the expense of the government of the District of Columbia for the fiscal year ending June 30, 1903, and for other purposes," Congress created an *ad valorem* tax of one and one-half per centum on all personal property, paragraph 2 of section 6 providing as follows:

"Par. 2. On all tangible personal property, assessed at a fair cash value (over and above the exemptions provided in this section), including vessels, ships, boats, tools, implements, horses, and other animals, carriages, wagons, and other vehicles, there shall be paid to the collector of taxes of the District of Columbia one and one-half per centum on the assessed value thereof."

By an act approved March 3, 1909, entitled, "An act making appropriations to provide for the expense of the government of the District of Columbia for the fiscal year ending June 30, 1910, and for other purposes," Congress laid an additional tax on automobiles by providing as follows:

"Automobile Board: For Secretary or Acting Secretary of the Automobile Board, three hundred dollars;

"Provided, That hereafter there shall be assessed and collected an annual wheel tax on all automobiles or other motor vehicles owned and operated in the District of Columbia having seats for only two persons the sum of three dollars, and on all such vehicles having seats for more than two persons an additional tax of two dollars for each additional seat."

It will be observed that both acts, the act of July 1, 1902, imposing a tax of one and one-half per centum on all personal property, and the act of March 3, 1909, imposing an additional tax on automobiles, have for their purpose the raising of revenue for the expenses of the District of Columbia, so that an automobile owner contributes twice to the same tax; once, for its general character as personal property, and again, because it is an automobile; while all other owners of personal property, horses, wagons, carriages, stocks, bonds, or securities, contribute but once. The same subject of taxation is subjected twice to the same burden, while other subjects of the same class bear it but once. Of such a tax, Mr. Cooley, in his work on Taxation, says as follows:

"There is a sense, however, in which duplicate taxation may be understood, and which we think is the proper sense—which would render it wholly inadmissible under any constitution, requiring equality and uniformity in taxation. By duplicate taxation in this sense is understood, the requirement, that one person, or any one subject of taxation shall directly contribute twice to the same burden, while other sub-

jects of taxation belonging to the same class are required to contribute but once."

Cooley on Taxation, section 394, and cases cited.

To the same effect,

"Whatever diversity of opinion may exist as to the general power of the legislature to impose duplicate taxation, there can be no doubt that to tax twice, the same property in the same hands for the same purpose, while other property belonging to the same class is taxed but once, is entirely subversive of the principle of equality of burden and cannot be allowed where such constitutional requirement exists."

Am. & Eng. Encyc., vol. 27, p. 609, and cases cited.

So, a tax on bicycles for the construction of bicycle paths, bicycles being within the classes of property subjected to general taxation, is void for inequality, and where such tax is assessed, regardless of valuation, it is invalid for like reasons.

*Ellis vs. Frazier*, 38 Oregon, 462.

The Chicago "Wheel Tax" was held illegal as a license fee, and unconstitutional as a double tax, the same vehicles being taxed for general purposes on their value as personal property.

*Chicago vs. Collins*, 175 Ill., 455.

Tax on wagons and carriages in addition to the general tax on personal property invalid as violation of uniformity and equality requirement.

*Livingston vs. Paducah*, 80 Ky., 656.

*Johnson vs. Macon*, 62 Ga., 645.

*Smith vs. County Comm'rs*, 117 Ala., 196.

So, of a tax of fifty cents per head on cattle.

*Kiowa Co. vs. Dunn*, 21 Colo., 185.

And a tax of \$1.00 per mile on railroads.

Pittsburg, etc., R. R. *vs.* State, 49 Ohio St., 189.

The constitutional rule of uniformity forbids that taxation should be double. No person can be twice assessed upon the cash value of the same property to defray a public burden.

Att'y General *vs.* Sanilac County, 71 Mich., 16.

The assessment of the capital stock of a corporation, as well as the property in which that capital is invested, is unlawful.

Lewiston Water Co. *vs.* Asotin Co., 24 Wash., 371.

Burke *vs.* Badlam, 57 California, 594.

Germania Trust Co. *vs.* San Francisco, 128 California, 589.

In *Livingston vs. Paducah*, 80 Ky., 656, the act provided:

"That the Common Council of the City of Paducah shall have the power and authority to license and tax all vehicles running in said city, or used in the conducting, or in connection with the regular business of the person or persons so running such vehicles, at the rate of not less than three nor more than ten dollars; Provided, however, that vehicles owned and used in the city for family use only shall not be taxed more than three dollars per annum."

In construing this act, the court said:

"Under other statutes, existing at the time the one quoted was enacted, provision was made for an *ad valorem* tax upon vehicles owned and used in the city for family use only, and as alleged in the petition of appellants, the same property upon which the specific tax complained of was attempted to be levied, was also regularly assessed and was assessable for taxation according to value. The necessary result, therefore, of upholding the specific tax upon such vehicles, would be to subject the same property to a double tax

each year for the support of the city government.  
\* \* \*

“Under any system of taxation that may be devised an exact equalization of the burdens of taxation is unattainable and utopian. Approximate equality being all that is practicable; and in many cases, especially where two or more systems of taxation are combined, duplicate taxation results incidentally and is unavoidable. It is therefore obvious that to declare every tax law invalid because it operates to some extent unequally, and incidentally imposes double taxes, would defeat all taxation. The power of the legislature to impose license tax, and tax on business, occupation, franchises, privileges, &c., being clear, the Statute under consideration to the extent that it provides for the imposition of a tax upon vehicles in the city of Paducah ‘used in the conducting of, or in connection with the regular business of the person or persons so using them’ is valid, notwithstanding such vehicles may, by a different statute, be subject to taxation according to their value for the same purpose. For though, in the apportionment of the specific tax, the amount each person is liable for, is determined by the number of such vehicles he may have, and they, in fact, constitute a portion of his capital invested in the business, still, *as the subject of taxation is the business*, and not the vehicle used as instruments or means of carrying it on, the tax is not invalid. To make the incidental and unavoidable, and often unappreciable results of the operation of a tax law, a test of its validity is beyond the province of the courts. It is only when statutes are passed which impose taxes on false or unjust principles, or operate to produce gross inequality so that they cannot be deemed in any sense proportioned to their effect on those who are to bear the public charges, that courts can interfere and arrest the course of legislation by declaring such enactments void (Cooley, Taxation, 127). A statute which makes any kind of property the subject of taxation, and discriminating, imposes upon it a double burden for a single object, makes even approximate equality and uniformity impossible, because it is an arbitrary and radical departure from both. By express provision

of the statute before us, the private vehicles of appellant are designated as subjects of taxation, and as usual are required to contribute, not incidentally or indirectly, but directly, twice each year, to the same object—the support of the city government—while on other property in Paducah only an annual tax is levied. But if the statute was not otherwise objectionable, the amount of tax authorized to be collected is grossly disproportioned to taxes usually imposed in that city, or that, with due regard to the constitution or the rights of the citizen, can be imposed. For, in addition to the *ad valorem* tax to which the property of appellants is subject, each of their vehicles is made liable under this statute for three dollars per annum, which in many cases, is equivalent to five or six per centum of their value. Such an imposition amounts to taking private property for public use without compensation, and should not be upheld or enforced. We are therefore constrained to hold it invalid as far as it affects vehicles ‘owned and used in the city for family use only.’ ”

In *State vs. Cumb. & Penn. R. R. Co.* (40 Md., 51), a Maryland statute imposing a tax of two cents per ton on coal was assailed as repugnant to the 15th Article of the Maryland Bill of Rights, which provides as follows:

“Every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the Government, according to his actual worth in real or personal property.”

The late Justice Alvey, speaking for the court, said:

“This is a fundamental declaration of the right of the citizen against unequal and undue assessments of taxes by the Government. \* \* \* What then is the character of the tax imposed by the act in question? It is beyond all doubt, a direct and specific tax on coal, and therefore a tax upon property. It is not assessed with reference to any uniform value of the coal, nor with reference and in conformity to any

rate of taxation imposed upon the other property of the State. It is therefore a specific, arbitrary tax levied for the support of the Government, as a part of the personal property of the State, without regard to value, uniformity or equality. Upon the same principle that the tax of two cents per ton is attempted to be imposed, if legal, the State could impose fifty cents, or even a dollar per ton, on all the coal mined and transported. \* \* \* It is not competent to the legislature to discriminate as between the different species of property, and to tax some by one rule, and some by another. All must bear the burden alike; for if it were otherwise, it would be impossible to observe the rule, which requires that every person in the State, or person holding property therein, shall contribute his proportion of public taxes, for the support of the Government, according to his actual worth in real or personal property. The protection afforded by the rule, consists in the equality and uniformity required, whereby one person shall not be taxed more nor less than another, because he may happen to own a different species of property from that owned by the other."

### **Not a License Tax.**

The tax was defended in the court below as a license or privilege tax (R., p. 4). It is not.

"A license is a privilege granted by the State, usually on payment of a valuable consideration, though this is not essential. To constitute a privilege the grant must confer authority to do something which without the grant would be illegal, for if what is to be done under the license is open to every one without it, the grant would be merely idle and nugatory, conferring no privilege whatever. But the thing to be done may be something lawful in itself, and only prohibited for the purpose of the license, that is to say, prohibited in order to compel the taking out of a license. This is always the case where that which is licensed was not unlawful at the common law."

Cooley on Taxation (2d ed.), p. 596.

A license or privilege tax, generally, though not necessarily, is imposed, not for revenue, but for regulating the enjoyment of some privilege, occupation, or business. The law imposing it may both regulate and tax, but where the fee is exacted solely for revenue purposes it is a tax.

*Brown vs. Maryland*, 12 Wheat, 419.

*Ward vs. Maryland*, 12 Wall., 418.

*Welton vs. Missouri*, 91 U. S., 275.

*Royall vs. Va.*, 116 U. S., 572.

*Sands vs. Edmunds*, 116 U. S., 587.

Tiedeman, in his work on State and Federal Control of Persons and Property (vol. 1, p. 495), in commenting upon the distinction between a license and a tax, says:

"It is therefore conclusive, that the general requirement of a license for the pursuit of any business that is not dangerous to the public, can only be justified as an exercise of the power of taxation, or the requirement of a compensation for the enjoyment of a privilege or franchise."

In *Elliott vs. Frazier*, 38 Oregon, <sup>462</sup>~~461~~, the court said:

"The use of a bicycle by its owner \* \* \* cannot well be classed as an occupation; and if it were it is not necessarily dangerous to the public. \* \* \* The act in question does not attempt in any manner to regulate the speed of bicycles, or require a bell to be attached thereto, or to carry a lighted lantern at night to avoid collisions, and hence it cannot be said that the statute was enacted for protection. Whatever the rule may be with respect to the granting of licenses which incidentally result in producing a revenue, or the law in relation to the authority of a municipal corporation in the maintenance of its streets, it cannot be reasonably inferred that the burden imposed by the act in question was an exercise of the police power of the State, \* \* \* we think from the consideration of the entire act that it was primarily designed as a means of raising revenue and

the burden thus imposed must be treated as a tax, and not a license."

**The doctrine of implied restraints upon legislative action secures to the citizen of the District of Columbia the equal protection of the laws.**

While the citizens of the District of Columbia have no local bill of rights and no local constitution, they are not without safeguards against encroachments upon those civic rights for the preservation of which constitutional government is formed.

In *Downs vs. Bidwell* (182 U. S., 261) all of the justices, while agreeing upon no other point, united in agreeing that the District of Columbia is an integral part of the United States and entitled to constitutional protection, Mr. Justice Brown, speaking for the court, saying (p. 261):

"The District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and State Governments to a formal separation. The mere cession of the District of Columbia to the Federal Government relinquished the authority of the States, but it did not take it out of the United States or from under the ægis of the Constitution. Neither party had ever consented to that construction of the cession."

So when we say that Congress has the exclusive power of legislation over the District of Columbia we do not concede that even within this ten miles square a despotism exists, and the act of Congress (16 Statute at Large, 426) expressly extending the Constitution to the District of Columbia seems a work of supererogation. But as the Fourteenth Amend-

ment does not in terms protect the residents of the District of Columbia, it is necessary to find some other limitation upon the power of Congress when acting as a local legislature for the District of Columbia.

The difference between the vesting of the legislative power in a particular body, and the manner of exercise of that power by that body, is too obvious to merit discussion. The Constitution, article 1, section 9, vests the power of legislation for the District of Columbia in Congress, but nowhere in the Constitution is there found any express direction as to the manner in which Congress shall exercise that power, and it must be interpreted in accordance with the general tenor of the whole instrument. In the absence of any express limitations in the clause itself, it must be construed so as to harmonize with the body of which it forms a part. Equality before the law, protection of individual right against discrimination, are fundamentals which pervade the whole Constitution. Can these be ignored in construing one of its clauses? The right to tax involves the power to destroy; nevertheless, no express limitation is required to restrain a destructive exercise of that right. Congress may not, when acting as a local legislature for the District of Columbia, disregard those implied restraints against abuse of legislative power which govern the action of all other legislative bodies. It may not arbitrarily, even were there no express restraints, discriminate between its citizens, tax a Jew because of his race, a Catholic because of his religion, impose a tax of three per cent on real estate on one side of the street and make the rate five per cent on the other side of the street; nor can it arbitrarily single out a particular kind of personal property to bear the burden of a tax to the exclusion of other kinds of personal property, even though its power to legislate for the District of Columbia is not restrained by any express limitation in the Constitution.

"Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons."

Mr. Justice Field, *in re Ah Fong*, 3 Sawyer, U. S., 157.

"The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens by the principles of constitutional liberty which restrain all the agencies of government, State and national."

Boyd *vs.* Nebraska, 143 U. S., 169.

The Constitution of thirty-three States require that taxation shall be "equal and uniform" or "proportional and reasonable" (Stimson, Federal and State Constitutions, section 333, p. 274); and most of the cases cited, *supra*, involve the validity of tax laws alleged to be in conflict with these constitutional provisions; but even without such express prohibition, an arbitrary and discriminative tax would be invalid, as in conflict with the *implied* limitations upon the exercise of legislative power. Neither a State nor the United States may select some obnoxious person and cast upon his property the sole burden of taxation, or a burden differing from that cast upon others whose property is similarly situated; and this is so whether *expressly* prohibited by constitution or not. Implied *restraints* are as well recognized a part of the doctrine of constitutional interpretation as implied *powers*, and are born of the same philosophy. Hence, the absence of express power or express prohibition is not alone determinative of the validity of a law. Cooley announces the doctrine as follows:

"It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed; \* \* \* a legislative act which should undertake to make a judge the arbiter in his own controversies would be void, because, though in form a provision for the

exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government. It could not be necessary to forbid the judiciary to render judgment without suffering the party to make defense; because it is implied in judicial authority that there shall be a hearing before condemnation. Taxation cannot be arbitrary, because its very definition includes apportionment, nor can it be for a purpose not public, because that would be a contradiction in terms. The right of self-government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government. The bills of right in the American Constitution forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void."

Cooley's Constitutional Limitations, 7th ed., pp. 242, *et seq.*

This doctrine has been sanctioned in the following cases:

Kerr *vs.* Ross, 5 App. D. C., 241.  
Curry *vs.* D. C., 14 App. D. C., 432.  
Lappin *vs.* D. C., 22 App. D. C., 68.  
McGuire *vs.* D. C., 24 App. D. C., 22.

See also—

Yick W. O. *vs.* Hopkins, 118 U. S., 369.  
Callam *vs.* Wilson, 127 U. S., 540.  
Gulf, C. & S. F. R. Co. *vs.* Ellis, 165 U. S., 150.

In Curry *vs.* D. C., *supra*, this court said:

"The power of Congress to legislate for the District of Columbia in all matters proper for legislation, whether of a general political nature or of merely municipal character, is given by the Constitution of the United States; and the extent of that power we regard as well established by judicial authority. The

power is exclusive, but it is not unlimited, nor is it arbitrary. There is no place in our governmental system for arbitrary or unlimited power. Our institutions are radically at variance with the theory of the existence of any such power anywhere in our country. In the case of *Loan Association vs. Topeka*, 20 Wall., 622, the Supreme Court of the United States, by Justice Miller, said:

“The theory of our Government, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined power. There are limitations on such power which grow out of the nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who are husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D, or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.

“The power of Congress in the District of Columbia, as elsewhere throughout the Federal Union, is distinctly limited by all the express guaranties of individual right contained in the Federal Constitution. No more in the District of Columbia than anywhere else within the United States, could the legislature of the Union pass a bill of attainder or an *ex post facto* law, or dispense with trial by jury, or establish a religion, or authorize unreasonable searches. All the general limitations imposed by the Constitution upon its authority are as applicable in the District of Columbia as in any other part of the United States. And not only are these express limitations applicable, but, in the language of Mr. Justice Miller, in the case just cited, all the ‘implied limitations which grow out of the nature of all free governments’ are equally applicable. The ‘exclusive’ power of legislation over the District which is vested in Congress by the Con-

stitution, must be assumed to extend only to all lawful subjects of legislation; and invasions of those fundamental individual rights, which lie at the foundation of the social compact, and for the maintenance of which free governments exist, are not lawful subjects of legislation.

"The Declaration of Independence is not, as has sometimes been flippantly asserted, a mere string of glittering generalities. It is a bill of rights which enters fundamentally into the structure of our Government; and the one great fundamental truth, which it seeks to enforce, is the doctrine of the equality of all men before the law. That doctrine is not again proclaimed in our Federal Constitution. It is nowhere referred to in the Constitution before the adoption of the Fourteenth Amendment. But in that amendment it was assumed as a cardinal principle of our republican institutions, and it was made obligatory upon the States, as such, that they 'should not deny to any person within their jurisdiction the equal protection of the laws.' Without the equal protection of the laws, republican institutions cannot exist. In fact, there is no civilized government of modern times that is not based, in theory at least, upon the principle of the equal protection of the laws to all citizens, although the practice is often halting and the influences of a baleful inequality in the past have not been wholly eliminated from the political system."

In *McGuire vs. D. C.*, 24 App. D. C., p. 22, this court, in holding unconstitutional the so-called Snow Law, used this language:

"The duty required to be performed is one which requires the most absolute uniformity with respect to all property within the so-called fire limits of the District \* \* \* and it is not to be tolerated that a burden should be imposed upon one piece of property, or upon the owner of it, when no such burden is imposed upon the adjacent property or the adjacent owner."

Again,

“To punish one owner for failure of compliance with the act, by fine and imprisonment and an assessment of his property, and to exempt the other from all duty and all liability for the same precise thing, is a species of inequality which is repugnant to the principles of national justice.”

Again,

“The primary requisite for all such legislation is that it should be uniform.”

Again,

“It is for this inequality and for this discrimination that we are constrained to hold the amendment to be a nullity. Equality before the law is a fundamental principle of our republican institutions. It is a principle as dear to us even as life or liberty; and any enactment that contravenes it cannot have the force of law.”

Respectfully submitted,

EUGENE A. JONES.



COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

OCT. 11-1910

*Henry W. Hodges.*  
*Chlerk.*

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# Court of Appeals, District of Columbia.

**OCTOBER TERM, 1910.**

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**No. 2146.**

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**LE ROY MARK, APPELLANT,**

*vs.*

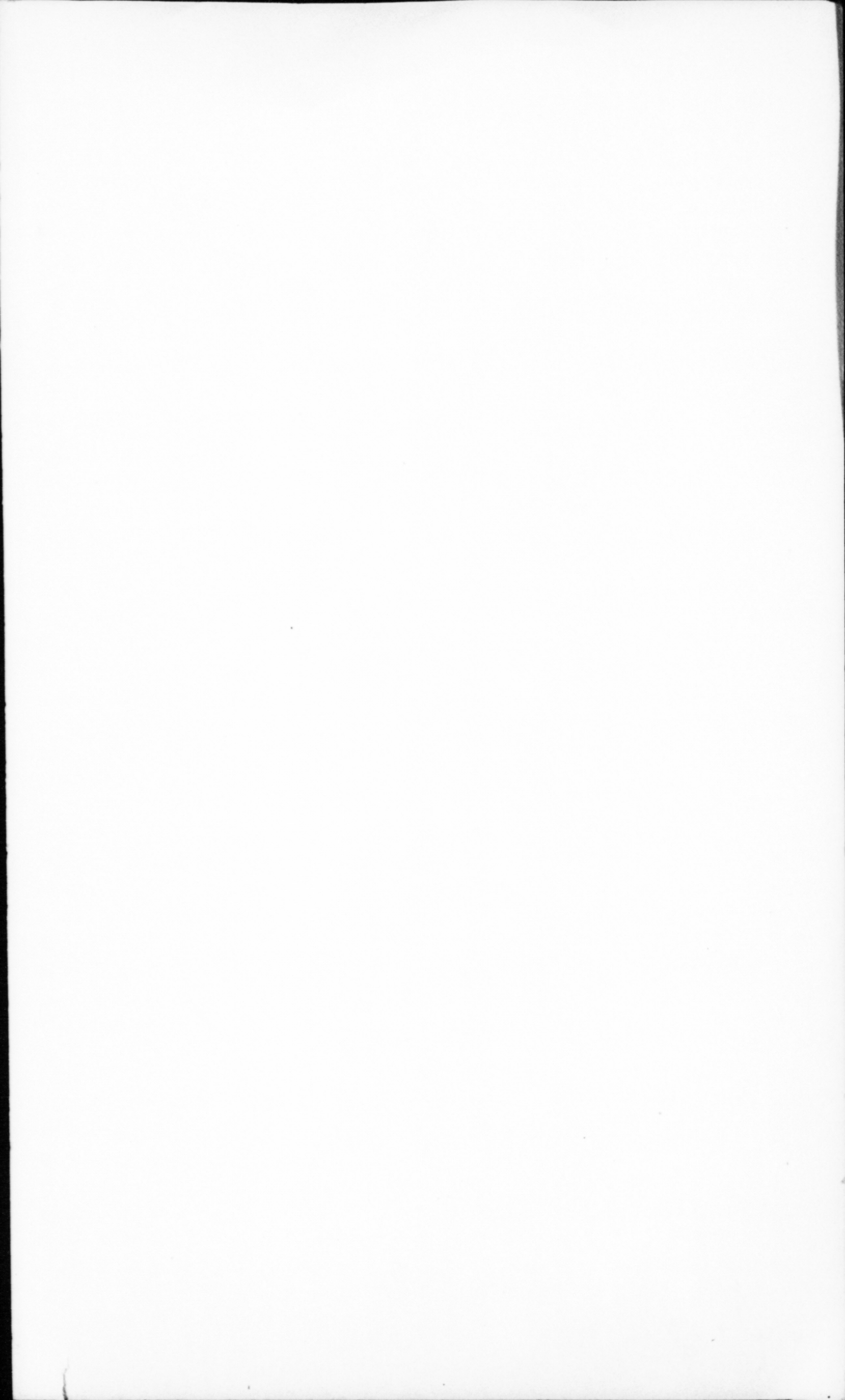
**THE DISTRICT OF COLUMBIA, APPELLEE.**

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**BRIEF FOR APPELLEE.**

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**EDWARD H. THOMAS,**  
*Attorney for Appellee.*



# Court of Appeals, District of Columbia.

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THE DISTRICT OF COLUMBIA, APPELLEE.

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**BRIEF FOR APPELLEE.**

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## **Statement of the Case.**

This is an appeal from a judgment of the Supreme Court of the District of Columbia dismissing a petition for a writ of certiorari. Petitioner alleges that he is a citizen of the District of Columbia and the owner of an automobile upon which he has paid a personal tax of one and one-half per cent imposed under the act of July 1, 1902; that by the act of March 3, 1909, Congress passed an act imposing an annual wheel tax upon all automobiles or other motor vehicles owned and operated in the District of Columbia, with seats

for two persons a sum of three (\$3.00) dollars, and on all such vehicles having seats for more than two persons an additional tax of two (\$2.00) dollars for each additional seat; that the Assessor of the District of Columbia assuming to act under the later law has levied and assessed against the petitioner a tax of five (\$5.00) dollars on the automobile owned by him and demanded payment of the said assessment which is now borne on the tax record of the District as a charge against the petitioner. That the said act of March 3, 1909, is repugnant to the Constitution of the United States because it is double taxation and unfair, and unjustly discriminates between owners of personal property having automobiles and owners of personal property not having automobiles, and denies the petitioner equal protection of the laws. Upon this petition a rule to show cause was issued, and to the petition and rule the District of Columbia made answer admitting the allegation of citizenship and ownership of the automobile and the passage of the act referred to, but denying the unconstitutionality of the act of March 3, 1909, and alleging that the same was valid as a privileged tax. Appended to the answer was a copy of section ten, article twenty-four of the police regulations providing for the constitution of the Automobile Board and for the examination of persons desiring to operate motor vehicles; and also an affidavit of the Superintendent of County Roads stating the destructive effect of automobile travel upon such roads. A demurrer was interposed to this answer, argument had, demurrer overruled and judgment entered discharging the rule to show cause and dismissing the petition, the petitioner having elected to stand upon his demurrer.

### ARGUMENT.

Petitioner claims that he is denied the equal protection of the laws because, as stated on page three of his brief, "the same subject of taxation is subjected twice to the same burden, while other subjects of the same class bear it but once," because automobiles are once taxed as part of the general personal property of the jurisdiction and then again subjected to the wheel tax imposed by the act of 1909 and 1910. The argument assumed that automobiles and personal property generally constitute the same class, and having assumed one of the points in dispute petitioner proceeds to argue on the validity of the tax. It is submitted that as there may be different classes in property generally, there may also be different classes of personal property, and upon these different classes Congress may impose taxes with special regard to the requirements of each class. The court below, however, sustained the tax, upon the theory that it is a privilege tax imposed upon a particular class of personal property operating upon the roads, having regard to the fact that the class, because of the weight and speed of these vehicles, is especially destructive to the roads.

In *Berry on Automobiles*, section 41, it is said that laws affecting automobiles are not objectionable as class legislation, citing *Malett vs. California*, 181 U. S., 589, 598; *Magon vs. Illinois*, 170 U. S., 283, 294; *Barbier vs. Conelly*, 113 U. S., 27-32; *R. R. vs. Pa.*, 134 U. S., 232, 237; also *Ry. vs. Ellis*, 165 U. S., 150, 155. See also, *Huddy on Automobiles*, pp. 72, 73, 75.

"The rule against double taxation is a rule of legislation and not of (constitutional) law; it is a question of expediency and not of power, and while the court will not infer an intention to impose a double tax, but rather uphold that construction of a statute

which relieves property from a double taxation, when the statute is susceptible of such a construction without forcing, *still the power of the legislature in that respect is undoubted.*" (Gray on Limitations of Taxing Power, sec. 1362.)

Judson on Taxation, sec. 426.

Cases cited in *R'y vs. Ellis*, 165 U. S., 155.

*Hayes vs. Mo.*, 120 U. S., 68:

Cities over ten thousand allowed 15 peremptory challenges in capital cases, and elsewhere in the State only 8, does not deny equal protection of the laws under Fourteenth Amendment.

*Mo. Pac. R'y vs. Mackey*, 127 U. S., 205:

A statute of Kansas, making railroad companies liable for all damages done to any employee by reason of negligence of its agents, engineer or other employees, not a deprivation of property without due process, nor does it deny equal protection of laws, and there is no conflict with Fourteenth Amendment.

*Watson vs. Nevin*, 128 U. S., 578:

A statute of Kentucky authorizing the city of Louisville to open and improve streets and assess costs against adjoining lot owners is valid.

*Bell's Gap R. R. vs. Pa.*, 134 U. S., 232:

Assessment on face value of bonds instead of actual value valid.

*Pacific Express Co. vs. Seibert*, 142 U. S., 339:

Tax on business done within the State does not violate requirements of uniformity and equality. See pages 351 and

352 as to uniformity, citing *Home Insurance Company vs. New York*, 134 U. S., 594, 606-7.

*Giozza vs. Tieman*, 148 U. S., 657:

Taxation of persons engaged in sale of liquors not invalid.  
The iron rule of equality discussed (662).

*R'y vs. Wright*, 151 U. S., 470:

Taxation of rolling stock and other unlocated property by the counties traversed legal.

*R'y vs. Mathews*, 165 U. S., 1:

Making railroads liable for property injured by fire, directly or indirectly, from locomotives is legal.

The cases relating to automobiles as a special subject of legislation and regulation are collected in 1 L. R. A. N. S., 215, in the note to *Christy vs. Elliott*. Among the cases there cited, two seem especially applicable.

*Com. vs. Hawkins*, 14 Pa. Dist. R., 592:

Sustaining the validity of an *ordinance* of Pittsburgh requiring a license fee upon automobiles of \$6 where the vehicle is intended to carry one or two persons; and a fee of \$10 if intended to carry more than two.

*Kersey vs. Terre Haute*, 161 Ind., 471:

Holding that the power of a municipal corporation to classify vehicles for the purpose of taxation includes the power to exclude automobiles from its scheme of taxation.

And on the question of discrimination, see

*N. Y. vs. State Board*, 199 U. S., 48.

*D. C. vs. Brooke*, 214 U. S., 138.

In *Kersey et al. vs. City of Terre Haute*, 161 Ind., 471, the court said:

"The power to tax is legislative in its character, and it is not required under the constitution of this State that there should be such an exact exclusion and inclusion of subjects of taxation as to meet fully the approval of the judicial mind as to what is reasonable.

"In the exercise of the power of classification a common council of a city is authorized, in a vehicle tax ordinance, to exclude from its scheme of taxation electric street cars and automobiles.

"A vehicle tax ordinance is not rendered invalid because it fails to provide for the taxing of vehicles of non-residents who habitually use the streets of the city.

"The provisions of the constitution (section 3, article 10) relating to uniformity applies only to a direct tax upon property, and does not apply to taxation imposed upon privileges and occupations."

*Denver City Railway Company vs. City of Denver*, 21 Col., 350.

In *Davis vs. May, &c., of Macon*, 64 Ga., 128, the court said:

"The city of Macon having power by charter to tax all persons exercising within the city any profession, trade, or calling of any kind whatsoever, may levy and collect a license tax upon every firm retailing meat in the city. An exception in the ordinance excepting farmers selling their own produce does not make the tax invalid. The tax is a business tax, and a farmer's business is production, not trade, and a sale by himself of what he raises or produces is merely occasional and incidental.

"The city may also tax a butcher or retailer of meats upon the wagon or wagons used in his business, and this likewise is part of the business tax.

"That the property taxed has already paid or been taxed *ad valorem* is no obstacle to the imposition of a business tax on the vehicles."

The rule against double taxation applies only to property taxes based upon value, not to privilege taxes.

Chicago *vs.* Collins, 175 Ill., 445, and cases noted;  
427 Enc. L., 610.

Payment of a privilege tax does not operate as an exemption from property taxation, unless the statute so provides.

Western Un. Tel. Co. *vs.* State, 9 Baxt. (Tenn.), 509.

Equality of taxation is not required by the Constitution.  
9 Pa. St., 361.

Congress having levied a tax upon an article is not thereby precluded from levying another.

U. S. *vs.* Benzon, 2 Cliff., 512.

The power to tax twice, it is said in another case, is as ample as to tax once.

West Chester Gas Co. *vs.* Chester County, 30 Pa. St., 232, cited with approval in Pittsburg, &c., R. R. *vs.* Commonwealth, 66 Pa. St., 73.

In the last-mentioned case the court said, double taxation is of frequent occurrence. The real and personal property of a corporation may be taxed, although it pays a tax on the stock which purchased it.

A State may impose upon a bank a privilege tax and upon the bank's assets an *ad valorem* tax.

New York *vs.* Chicago, B. & Q. R. Co., 56 Neb., 572.

That a corporation pays a license to carry on the business of making and selling doors, sash, &c., does not exempt it from paying the license required for using wagons and drays, even though such use is necessary to carrying on the corporation.

Macon Sash Co. *vs.* Mayor, 96 Ga., 23.

Distillers may be taxed on their whiskey stored in their warehouses, though they have paid a tax on the business of wholesale liquor merchants carried on by them separate from the distillery.

Frankfort *vs.* Gaines, 88 Ky., 59.

Income may be taxed though invested in real estate which is taxed the same year.

Lott *vs.* Hubbard, 44 Ala., 593.

There is no imperative requirement that taxation shall be equal. If there were the operations of government must come to a stop, from the absolute impossibility of fulfilling it.

1 Cooley, p. 254.

An excise tax on one kind of business only is not illegal for the discrimination; it is always to be conclusively presumed that the legislature found good and controlling reasons impelling the action it has taken, and that in view of the circumstances which were known to its members, the tax which has been provided for is reasonable.

1 Cooley on Taxation and cases, pp. 255, 256.

It is within the power of Congress, acting as the local legislature of the District of Columbia, to tax different classes of property within the District of Columbia at different rates.

*Gibbons vs. D. C.*, 116 U. S., 404.

Congress may wholly exempt from taxation certain classes of property in the District of Columbia. *Id.*

“Uniformity” requires all property similarly situated to be taxed at the same rate and in the same manner, while “equality” requires a fair and equitable distribution of the burden of taxation.

27 Enc. L., 600, and cases n. 3.

Where the Constitution requires uniformity in distributing the burden of taxation the legislature is generally permitted to divide property into classes and impose different rates on different classes.

*Id.*, 600, n. 4, and cases.

Requirement of uniformity does not prohibit specific taxes.

*Id.*, 601, n.

The requirement as to uniformity does not take away from the legislature the power of selecting the subject of taxation. It does require that all the members of the class selected shall be included in the taxing law.

*Assessors vs. Central R. Co.*, 48 N. J. L., 146.

Railroad property may be separately classed.

*Northern Pac. R. Co. vs. Walker*, 47 Fed. Rep., 686.

Court officers' fees may be divided into two classes and varying rates imposed according to whether the same incumbent holds one or more offices.

*Com. vs. Anderson*, 178 Pa. St., 171.

Peddlers of foreign goods may be taxed as a distinct class.

*Rosenbloom vs. State*, 64 Neb., 342.

Live stock brought into the State to graze; legislature may make a special class of them.

*Wright vs. Stinson*, 16 Wash., 368.

Non-residents may be classed by themselves for the purpose of taxation.

*Nelson Lumber Co. vs. Lorraine*, 22 Fed. Rep., 54.

*D. C. vs. Brooke*, 214 U. S., 138, and cases cited in the opinion of the court.

### **Occupation, Business, and Privilege Taxes.**

"These taxes are not taxes upon property, and, consequently, are not subject to constitutional restrictions upon the power to tax property; such as, for example, as that taxes shall be uniform and equal. Now, under the general requirement that all taxation shall be uniform and equal, is it necessary that all occupations should be taxed; but it is sufficient if all in the same class are taxed alike."

25 Enc., 480-1 (1st ed.).

"The provision merely requires that a tax on each member of the same class shall be the same. It does not prevent dividing objects of taxation into classes and imposing different taxes on each class."

*Id.*, n. (481.)

"The tax upon warehousemen which is measured by the number of warehouses employed, is held to be uniform and equal."

*Id.*, n. (481.)

*Hodgson vs. N. O.*, 21 La. Ann., 301.

"As it is a tax upon keepers of billiard tables, the whole being assessed upon each and every table."

*Meriam vs. N. O.*, 14 La. Ann., 318, n.

"Any avocation may be made a privilege by the legislature by the requirement of a license tax for its exercise."

*Id.*, 485, n.

*Mabye vs. Tower*, 1 Humph. (Tenn.), 94.

*Run vs. Cullen*, 13 Lea (Tenn.), 202.

*State vs. Sablier*, 3 Heide (Tenn.), 281.

### **In General.**

Courts cannot interfere with the legislature in the exercise of the taxing power, unless constitutional limitations are contravened.

27 Enc., (1), n. 5, citing many cases, and  
*Del. R. R. Tax*, 18 Wal., 206.

*State Tax on Gross Receipts*, 15 Wal., 296.

*Kirkland vs. Hotchkiss*, 100 U. S., 691.

*Cooper vs. Telfair*, 4 Dal., 14.

"If the legislation keeps within its proper sphere of action and does not impose burdens under the name of taxation, which are not taxation in fact, its decisions as to what is proper, just, and politic, both in respect to the subjects of taxation and the kind and amount of taxes, must be final and conclusive."

27 Enc., 616, n.

*Turner vs. Althous*, 6 Neb., 54.

*Bank vs. Billings*, 4 Pet., 561.

*Shaw vs. Dennis*, 10 Ill., 418.

*Wynehamer vs. People*, 13 N. Y., 404.

“The burden of proof is upon him who assails the action of the legislature, and to warrant judicial interference he must make out a clear case of violation of judicial interference.”

*Id.*, n.

*Brown vs. Denver*, 3 Colo., 169.

It is within the province of the courts, however, to determine in particular cases, whether the extreme boundary of legislative power has been reached and passed.

*Cummings vs. Bank*, 101 U. S., 153.

But courts cannot declare an act void merely because it is opposed to the spirit of the Constitution. The incompatibility with the Constitution must be clear.

*Livingston Co. vs. Darlington*, 101 U. S., 407.

*Fletcher vs. Peck*, 6 Cr., 128.

### **The Constitution.**

By section 8, article I, of the Constitution—

“Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.”

But this does not apply to local taxation in the District of Columbia.

*Loughborough vs. Blake*, 5 Wheat., 317.

*Gibbons vs. D. C.*, 116 U. S., 107.

*Parsons vs. D. C.*, 170 U. S., 56.

See also

*Moore vs. Miller*, 5 App., 420.

*Davidson vs. New Orleans*, 96 U. S., 97, 106.

"The tax is uniform when it operates with the same force and effect in every place where the subject is found," *Moore vs. Miller, sup.*

A tax upon carriages is not a direct tax.

*Hylton vs. U. S.*, 3 Dallas, 171, 173; 1 Story on Const., § 954, 957; *Pacific Ins. Co. vs. Soule*, 7 Wall., 433, 444, 446.

### **Form of Remedy.**

It is proper to be suggested to the court, also, that the remedy by certiorari is not the proper one. In other words, the case sought to be declared arose under the act of 1909, which was defective in that it provided no means for its enforcement. It was because of this defect that the act of 1910 was passed making this wheel tax part of the personal tax law, which contained within itself means for its enforcement, namely, by distraint. Owing to this omission in the act of 1909, the only method by which the tax could be collected would be by an action of debt against recalcitrant owners of automobiles. No such action has been filed against the petitioner herein, nor has his property been distrained or threatened with such action or distraint. And the appellee now disclaims any right to distrain for such tax. And if any action were brought the petitioner would have a defense thereto, if his contention in this case be correct. This court has decided that the writ of certiorari could not be brought where the petitioner has an adequate remedy at law. *Presbyterian Church vs. D. C.*, 34 App., 600. This case seems to be the converse of that, Is a taxpayer entitled to the writ to cancel an illegal tax which could not be collected except through the medium of an action against him, and in which action he would be entitled to set up the illegality of the tax?

The acts pertaining to the present case are printed as an appendix hereto, for the information of the court.

Respectfully submitted,

EDWARD H. THOMAS,  
*Attorney for Appellee.*



## APPENDIX.

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The speed of automobiles in the District of Columbia was regulated by act of Congress approved June 29, 1906 (34 Statutes, 621). The appropriation act approved March 2, 1907 (34 Statutes, 1126), makes the following provision:

“For the purchase of metal identification number tags for motor vehicles in the District of Columbia, three hundred dollars, or so much thereof as may be necessary; and the Commissioners of the District of Columbia are hereby authorized to amend the regulations controlling motor vehicles so as to provide that for such identification tax and registration thereof the owner of each motor shall pay the sum of one dollar and the secretary of the automobile board shall, after the payment of said fee to the collector of taxes, District of Columbia, issue to said owner the identification number tag.”

Act February 5, 1908, 35 St., 12:

“For additional amount required for the purchase of enamel metal identification number tags for motor vehicles in the District of Columbia, two hundred and fifty dollars; and the Commissioners of the District of Columbia, are hereby authorized to amend the regulations controlling motor vehicles so as to provide that for such identification tag and registration thereof the owner of each motor vehicle shall pay the sum of two dollars and the secretary of the automobile board shall, after the payment of said fee to the collector of taxes District of Columbia, issue to said owner the identification number tag.”

Act March 3, 1909, 35 St., 693:

“Automobile Board: For secretary or acting secretary of the automobile board, three hundred dollars: Provided, That

hereafter there shall be assessed and collected an annual wheel tax on all automobiles or other motor vehicles *owned and operated* in the District of Columbia, having seats for only two persons the sum of three dollars, and on all such vehicles having seats for more than two persons an additional tax of two dollars for each additional seat."

Act May 18, 1910:

"Automobile Board: Secretary or acting secretary of the automobile board, three hundred dollars.

The act of Congress approved July first, nineteen hundred and two (32 Stats., 617) entitled, "An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30, nineteen hundred and three, and for other purposes," be, and the same is hereby amended by adding to section seven of the said act, at the end thereof, the following:

That hereafter there shall be assessed and collected an annual wheel tax on all automobiles, or other motor vehicles owned or operated in the District of Columbia, having seats for only two persons, the sum of three dollars; and on all such vehicles having seats for more than two persons an additional tax of two dollars for each additional seat."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the amendment to section forty-four hundred and seventy-two of the Revised Statutes, approved February twentieth, nineteen hundred and one, be amended to read as follows:

"Nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: Provided, however, That all fire,

if any, in such vehicles or automobiles, be extinguished immediately after entering the said vessel, and that the same be not relighted until immediately before said vehicle shall leave said vessel: Provided further, That any owner, master or agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles the tanks of which contain gasoline, naphtha, or other dangerous burning fluids."

Act July 1, 1902, 32 St., 617:

"Par. 11. That proprietors or owners of hacks, coaches, omnibuses, carriages, wagons, and other passage vehicles, for hire shall pay license taxes as follows: Vehicles drawn by one animal, six dollars per annum; autovehicles, automobiles, or other horseless vehicles by whatever name called, and vehicles drawn by more than one animal, nine dollars per annum. Licenses issued under this section shall date from July first in each year. The driver of every licensed passenger vehicle, while transacting business as such driver shall wear conspicuously upon his breast a badge numbered to correspond with the license of his vehicle. The badge shall be furnished by the District of Columbia and a tax of fifty cents shall be charged therefor in addition to the amount of the vehicle license."

"Par. 13. That proprietors or owners of establishments where autovehicles of any pattern or description, or motor power whatsoever are kept for hire or are kept or stored for others, for profit or gain, shall pay a license tax of twenty-five dollars per annum for ten vehicles or less and two dollars additional for each vehicle in addition to ten; Provided, That nothing in this paragraph shall be construed as to exempt the owner of any vehicle using the public stands from paying the additional license tax provided in paragraph eleven of this section."

Section 6 of the Appropriation Act approved July 1, 1902 (32 Statutes, 617), provides a scheme for taxation of tangible personal property of one and one-half per centum on the assessed value thereof (par. 2).

Section 7 of this act (Par. 1), provides, "that no person shall engage in or carry on any business, trade, profession or calling in the District of Columbia for which a license tax is imposed by the terms of this section without having obtained a license so to do." The remaining forty-seven paragraphs of this section prescribe with some detail the *license* taxes for this District. This wheel tax, therefore, is a part of the license law and is, upon its face, at least, a license or privilege tax.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be levied, collected and paid, upon all carriages for the conveyance of persons, which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers, the several duties and rates following, to wit: For and upon every coach, the yearly sum of ten dollars—for and upon every chariot, the yearly sum of eight dollars—for and upon every phaeton and coaches, six dollars—for, and upon every other four wheel and every two wheel top carriage, two dollars—and upon every other two-wheel carriage, one dollar. Provided, always, That nothing herein contained shall be construed to charge with a duty any carriage usually and chiefly employed in husbandry, or for the transporting or carrying of goods, wares, merchandise, produce or commodities." (Sec. 1, Act of June 5, 1794; 1 Stats., 374.)

